No. 96-1578 (14)

In the

Supreme Court of the United States

OCTOBER TERM, 1997

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. JACK HIGHTOWER, HON. NATHAN L. HECHT, HON. LLOYD DOGGETT, HON. JOHN CORNYN, HON. BOB GAMMAGE, HON. CRAIG T ENOCH, HON. ROSE SPECTOR, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

AMICUS BRIEF OF MASSACHUSETTS BAR FOUNDATION IN SUPPORT OF PETITIONERS.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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The Massachusetts Bar Foundation ("MBF") hereby submits this brief as amicus curiae in support of the petitioners in

this matter. Petitioners and respondents have consented to MBF's participation as amicus. Letters setting forth this consent accompany this brief.

Interest of Amicus Curiae

The MBF is a charitable corporation established in 1964 as the charitable arm of the Massachusetts Bar Association, the principal statewide organization of lawyers practicing in the Commonwealth of Massachusetts.

In 1985, the Massachusetts Supreme Judicial Court established the Interest on Lawyers' Trust Accounts ("IOLTA") program in Massachusetts that permitted lawyers to pool short-term and nominal client funds entrusted to their custody in interest-bearing accounts with the interest payable to certain organizations, including MBF, that fund legal services for indigents and programs for improving the administration of justice. *See generally Petition of Massachusetts Bar Association*, 395 Mass. 1, 478 N.E.2d 715 (1985). The Court later required all Massachusetts lawyers to use IOLTA accounts for such client funds.

MBF currently is responsible for allocating approximately one-quarter of the funds raised by the Massachusetts IOLTA program, nearly $2 million in 1996. In Massachusetts, IOLTA funds not only traditional legal services programs for the benefit of people unable to afford representation (in divorce cases, landlord-tenant disputes, and the like) but also programs designed to enhance the administration of justice. Recent grant recipients have included several mediation and other alternative dispute resolution programs that have the effect of reducing congestion in Massachusetts courts, as well as programs providing coordination and support for "lawyer for a day" and other pro bono projects that assist pro se litigants and other

unrepresented persons. The Flaschner Judicial Institute, an organization dedicated to providing continuing education programs for judges in Massachusetts, receives a significant portion of its funding from the Massachusetts IOLTA program.

In 1991, respondent, Washington Legal Foundation, and several individuals brought suit in the United States District Court for the District of Massachusetts against the Massachusetts Supreme Judicial Court, the MBF and other parties involved in the Massachusetts IOLTA program challenging the constitutionality of that program on grounds essentially identical to those raised here. The First Circuit affirmed the dismissal of those claims, finding that the IOLTA program neither took the property of Massachusetts lawyers or their clients in violation of the Fifth Amendment, nor infringed their rights under the First Amendment. *Washington Legal Foundation* v. *Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993).

MBF has a direct interest in this case because the Texas IOLTA program in many respects is similar to the Massachusetts program and a decision by this Court upholding the Fifth Circuit's conclusion that the former is unconstitutional may pose a direct threat to the Massachusetts program. If the Massachusetts IOLTA program is invalidated in its current compulsory form, the resources available to advance the common goals of MBF and the IOLTA program will be dramatically reduced.

MBF shares with this Court a passionate commitment to "equal justice under law," as well as a deep concern for improving the administration of justice in state and federal court systems. In this age of diminished public funding of legal services and the judiciary, the IOLTA program is an essential part of achieving these goals.

Summary of Argument

The Fifth Circuit erred for two reasons when it found that the Texas IOLTA program effectuated an uncompensated taking of property in violation of the Taking Clause. First, the right to direct the allocation of interest earned on nominal or short-term client funds deposited by lawyers in IOLTA accounts is not a "property" right. Historically, the decision by clients to entrust such funds to lawyers has never been an investment decision undertaken with any expectation of earning an economic return. The transaction costs associated with allocating to particular clients the small amount of interest that such funds could generate would exceed the value of that interest. As a result, there has never been a legitimate, historically validated expectation either to receive any return from the deposit of nominal or short-term client funds or to have any control over the disposition of the bank's return on the investment of such deposits. Accordingly, the IOLTA program's requirement that lawyers place such funds in accounts with respect to which the depository bank agrees to pay interest to TEAJF takes no client "property."

Second, even if the Texas IOLTA program did affect "property" interests, the extent of any interference is so minimal that no "taking" can be found. It is undisputed that the clients whose funds are deposited in IOLTA accounts suffer no economic harm whatever. The value of their "property" is exactly as it would be in the absence of the IOLTA program. Because the economic impact of the program to clients is insignificant and alters no reasonable investment-backed expectations, and because the public interest served by the IOLTA program is a legitimate and important one, there is no regulatory taking.

Nor does the IOLTA program constitute a *per se* taking without regard to the usual balancing test applicable to regulatory takings. The program effectuates no physical invasion of property. Nor does it deprive clients of all beneficial use of their property. In this regard, ***Webb's Fabulous Pharmacies, Inc.*** v. ***Beckwith***, 449 U.S. 155 (1980), is distinguishable. There, the parties with a property interest in the interpleaded funds were involuntarily deprived of *all* beneficial use of the funds for a significant period of time because the funds were completely unavailable to those parties and 100% of the interest — a sizable sum in *Webb's* — was retained by the State. By contrast, clients whose funds are deposited in Texas IOLTA accounts entrust such funds voluntarily to their lawyers, have access to the principal on demand and lose no interest that they otherwise would have obtained. The IOLTA program is in no way confiscatory and therefore does not constitute a *per se* taking.

Argument

I. The Texas IOLTA Program Does Not Constitute An Unconstitutional Taking Of The Property Of Clients In Texas.

A. The right to allocate interest on nominal and short-term funds entrusted to Texas lawyers is not a property right of clients.

1. Historically, clients had no expectation of obtaining any investment return on nominal and short-term funds entrusted to their lawyers.

There is no dispute that funds entrusted to Texas lawyers by their clients are the "property" of the clients. Nor is there any dispute that the ethical rules governing the conduct of lawyers in Texas require lawyers to deposit those funds so that they are available to clients on demand. Nor is there any dispute that client funds eligible for deposit in IOLTA accounts are so small in amount or will be held for such a short period of time that the modest interest that a bank would pay on such funds would be less than the expense associated with accounting for those funds, reporting them to clients for tax purposes, and making the funds actually available to the clients. That is why nominal or short-term client funds historically have been held in non-interest bearing accounts.

That historical fact is important here. Because there has historically been no practical way to earn a return on nominal or short-term client funds, clients have never had any expectation of earning a return on such funds. The decision to entrust such funds to a lawyer has never been an investment decision; it has always been, rather, a decision born of convenience and the need for security. Alternative arrangements — e.g., es-

crow accounts, more formal trust arrangements — would impose costs and delays that clients are happy to avoid.

The changes in federal banking law that permitted banks in effect to pay interest on demand accounts did not change these economic realities. Those changes did not reduce the administrative costs of processing interest on client's nominal or short-term funds. Client funds that could not be invested to generate a positive return to the client before the advent of NOW (i.e. "negotiable order of withdrawal") accounts, could not be so invested afterwards.

What the advent of NOW accounts did create was the possibility of generating an economic return on pooled client demand accounts. The generation of interest is possible only if the administrative costs that would be required to allocate the interest on such accounts among the clients whose funds are pooled can be avoided. This is not a matter of "alchemy," but rather the predictable effect of economies of scale. The aggregation of many small or short term deposits in a single account allows the payment of interest in amounts that exceed the administrative costs associated with the account *viewed as the account of a single depositor*. This is true even though the costs that would be associated with allocating the interest among the clients would still exceed the interest on the account as a whole.[1]

Despite these characteristics, the Fifth Circuit concluded that the interest paid by the banks holding IOLTA accounts to TEAJF is the "property" of the clients whose pooled short-

[1] This problem cannot be avoided by the bank's reporting the aggregate interest on the pooled client account to the lawyer. The lawyer's office would then have the task of calculating the amount of the interest allocable to each client, processing the payment of those portions to each client, and satisfying the reporting obligations associated with the tax laws. The lawyer would be entitled to charge the client for the expenses incurred in performing these tasks, charges that would more than wipe out the interest to be paid.

term and nominal funds generated the interest. The Fifth Circuit erred in reaching this conclusion. When measured against the criteria that this Court has employed to identify "property" interests, it is clear that no property interest is involved in this case.

2. Property rights do not arise from the Constitution, but rather from expectations that have historically received general legal protection.

This Court has recognized consistently that the protections for "property" rights in the Fifth and Fourteenth Amendments do not themselves create such rights. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Moreover, as this Court noted in *Roth*:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id. See also Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-31 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 1000-04 (1984).

In other words, it is the consistent recognition of a particular right over time, giving rise to a reasonable, widely shared (as opposed to a merely "unilateral") expectation that the right

will continue to be recognized, that permits the characterization of a right as "property." *See Lucas*, 505 U.S. at 1016 n.7, 1027. It is only by stressing historical recognitions giving rise to reasonable expectations that one can avoid the circularity of the simplistic notion that property is whatever the State says it is. Otherwise, the State could, "by *ipse dixit*, . . . transform private property into public property without compensation," contrary to the plain import of the Takings Clause. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

3. The interests of clients in controlling the interest paid on IOLTA accounts does not constitute a "property" interest.

The Fifth Circuit based its ruling that the interest generated on IOLTA accounts constitutes the "property" of the clients whose nominal and short-term funds are held in those accounts on the maxim that "interest follows principal," *Washington Legal Foundation* v. *Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1000 (5th Cir. 1996), a maxim that the court found to be the "traditional rule" under Texas law, *id.*, as well as the predicate for this Court's ruling in *Webb's*, *id.* at 1001. In so ruling, the court allowed the maxim to substitute for the kind of analysis that this Court has applied in identifying "property" interests. If one undertakes the necessary analysis, the error of the Fifth Circuit becomes apparent.

The maxim "interest follows principal" reflects the general understanding that when property is invested, any positive return on the investment ordinarily belongs to the owner of the invested property. For example, minerals and crops ordinarily belong to the owner of the land on which the mine or field is found.

This is not always the case, of course. Income can be severed from the property that generates it. For example, Texas law recognizes the power of trust settlors to create disjoint sets of income and principal beneficiaries. *See* Texas Property Code Ann. § 113.103 (West 1995); *Wilkes* v. *Wilkes*, 488 S.W.2d 398 (Tex. 1972); *Van Hoose* v. *Moore*, 441 S.W.2d 597 (Tex. Civ. App. 1969). Disparities between ownership of principal and interest can occur by operation of law as well. Although spouses retain sole title of property they owned before marriage, income generated by such property during the marriage is community property under Texas law. *See* Tex. Fam. Code Ann. § 5.01 (West 1995); *Broday* v. *United States*, 455 F.2d 1097 (5th Cir. 1972); *C.I.R.* v. *Chase Manhattan Bank*, 259 F.2d 231, 239 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959) Nevertheless, in most situations involving *investment* property, absent a voluntary modification by the property's owner, ownership of the principal entitles one to own the investment return.

Not every use of property, however, is an investment undertaken in anticipation of an economic return. Before the advent of NOW accounts, most people maintained checking accounts at banks that paid no interest on the funds deposited. As a matter of law in Texas (and generally elsewhere) the relationship between a bank and a depositor is that of debtor-creditor, founded on contract. *Bank of Marin* v. *England*, 385 U. S. 99, 101 (1966); *Great Com. Life Ins. Co.* v. *Banco Obrero de Ahorro*, 535 F.2d 331, 331 (5th Cir. 1976); *American Bank of Waco* v. *Waco Airmotive, Inc.*, 818 S.W.2d 163, 170 (Tex. Ct. App. 1991). Under this contractual relationship, the bank becomes absolute owner of the money as soon as it is received. *See Texas Commerce Bank* v. *Townsend*, 786 S.W.2d 53, 54 (Tex. Ct. App. 1990); *Stone Fort Nat. Bank of Nacogdoches*, 91 S.W.2d 674, 676 (Tex. 1936). The bank's obligation to a checking account depositor is to repay the

amount due to the depositor upon demand and to honor checks properly drawn on the account. The bank is free to commingle the funds from its depositors and invest it as it pleases. *New York County Nat. Bank* v. *Massey*, 192 U.S. 138, 145 (1904), *cf. Texas Commerce Bank*, 786 S.W.2d at 54.

To be sure, deposited funds are invested by the depository bank (in mortgages, commercial loans, and the like) to earn a return that exceeds the expenses of the bank allocable to the deposit. The depositor has no property interest in that return, however. Whatever the bank earns on its investment of deposits is the bank's property, not the depositor's. Nor does the depositor has any right to affect the bank's own investment decisions. An atheist has no property right to veto a bank's decision to lend money for the construction of a church, or to make contributions to religious charities. The only legitimate expectation of the depositor is that the bank will honor its contractual obligation to make the funds available on demand and to honor checks drawn on the account for which sufficient funds are available.

As noted above, nominal and short-term client funds entrusted to lawyers historically were deposited in pooled non-interest bearing accounts maintained in the name of the lawyer. Such accounts earned no interest for the owner of the deposit; there was no expectation of obtaining an investment return on such funds because the decision to entrust was not an investment decision. The funds were such that there could be no reasonable expectation of a return.

The Texas IOLTA program did not alter the expectations of clients in this regard at all. Nominal and short-term client funds in IOLTA accounts remain secure and available on demand. The only difference is that instead of keeping all of the money that it earns from the investment of deposits in client trust accounts, the bank agrees (if it wants to keep such deposits) to pay that portion of its earnings on those deposits to

TEAJF. Clients, however, never had any expectation of affecting the bank's return on its investment of deposited funds. None of the strands in the bundle of rights constituting the property interest of clients in nominal or short-term funds entrusted to their lawyers is diminished or removed.

Invoking the "right to exclude others" does not warrant a different conclusion. To be sure, in other, quite different contexts the "right to exclude" constitutes the dominant strand in the bundle of rights we call "property." *See, e.g., Ruckelshaus*, 467 U. S. at 1011-12; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176, 179-80 (1979). But clients have never had the right to exclude others from the benefit of the economic return on their deposits while held in client fund accounts. That has always been a matter for the bank alone to determine, subject to federal and state banking regulations. By directing lawyers to deposit such funds in banks that agree to pay a portion of their return to TEAJF, Texas has not affected any "right to exclude," since clients have never had such a right in their property "bundle" to begin with.

B. *Even if clients have a technical property interest in the interest accrued on funds deposited in IOLTA accounts, Texas IOLTA program does not cause a compensable taking.*

1. This Court's decision in *Webb's Fabulous Pharmacies* does not establish a rule that the IOLTA program's requirements concerning interest on IOLTA accounts constitutes a *per se* taking under the Fifth Amendment.

Critical to the Fifth Circuit's decision in this case is its reading of *Webb's Fabulous Pharmacies* as having "create[d] a rule that is independent of the amount or value of interest at issue, holding that a property interest existed in the accrued interest simply because '[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property'." 94 F.3d at 1002 (quoting *Webb's*, 449 U.S. at 164). The Fifth Circuit's interpretation of *Webb's* is incorrect. Properly understood in light of this Court's later development of taking law, *Webb's* is entirely consistent with the district court's conclusion that the Texas IOLTA program causes no unconstitutional taking.

Webb's arose out of an agreement to purchase substantially all of the assets of a Florida corporation for approximately $2 million. Since the seller owed substantial sums, the buyer feared that the conveyance would be challenged by the seller's creditors as fraudulent. Florida law permitted the buyer to obtain clear title by depositing the purchase price into court and interpleading the seller and its creditors, and the buyer did so. *Webb's*, 449 U.S. at 156 & n.2.

This Court recognized that under the law of Florida and elsewhere, the funds deposited were "private property." *Id.* at 160-61. The sole purpose of the interpleader action was to resolve the competing claims of the seller and its creditors to the funds deposited. Florida statutory law directed the clerk of court to invest the funds in "designated depository banks in interest-bearing certificates" and provided not only that the clerk charge a fee for the administrative services associated with accepting the deposit, but also that the interest generated "shall be deemed income of the office of the clerk of the circuit court investing such moneys." *Id.* at 156 n.1, 157 n.3. Pursuant to this statute, when the funds were transferred to a receiver for the seller, the clerk retained the accumulated interest which exceeded $100,000. The creditors claimed that the retention of the interest constituted an unconstitutional taking. This Court agreed.

Justice Blackmun's opinion for the Court does not explain in great detail the rationale for the Court's conclusion. The Court stated that the "usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Id.* at 162. Justice Blackmun then noted that while the government "may deny the property owner of some beneficial use of his property . . . , if such public action is justified as promoting the general welfare," *id.* at 163, in the case before the Court, "[n]o police power justification is offered for the deprivation," *id.*[2] The Court ruled that the withholding of interest was an uncompensated taking of property.

Since *Webb's* was decided, this Court has developed its takings jurisprudence in a series of cases that have recognized two distinct branches of takings analysis.

Where government regulation merely reduces the value of property, the Court has applied an "essentially ad hoc, factual inquir[y], " *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), intended to ascertain whether the regulation has gone "too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). The Court has identified three factors that have "particular significance:" "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the

[2] Significantly, the state could not justify the withholding of interest as a means for compensating the state for the expenses associated with the administration of the fund pending the resolution of the interpleader proceeding. Florida law authorized the retention of a fee, calculated as a function of the amount deposited, in addition to the withholding of the interest. There was no challenge to the fee. This Court's later decision in *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 (1989), makes it clear that no such challenge would have succeeded.

governmental action.'" *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Central*, 438 U.S. at 124).

The Court has identified two types of governmental action that constitute categorical or *per se* takings "without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first type of categorical taking involves government action that brings about a "physical invasion" of real property. *See, e.g., Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (permanent fixing of cable facilities); *United States* v. *Causby*, 328 U.S. 256 (1946) (physical invasion of airspace). *Cf. Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) (grant of building permit contingent on dedication of public easement).

The Texas IOLTA program plainly does not effect a physical taking of any property owned by Texas clients. Subsequent to *Webb's*, this Court made it clear that the withholding of payment from funds held by the government does not constitute a physical taking. *United States* v. *Sperry Corp.*, 493 U.S. 52, 59-64 (1989). *See also Yee* v. *City of Escondido*, 503 U.S. 519, 526-32 (1992); *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993). Where, as here, the government action does not deprive the property owner of anything that the owner would have had in the absence of the government action, there is nothing that can be characterized as a physical taking.

The second category of per se taking arises in situations "where regulation denies all economically beneficial or productive use" of property, *Lucas*, 505 U.S. at 1015. *See, e.g., id.* (denial of permit to build habitable structures). *Cf. Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1010-14 (1984) (regulation destroying the economic value of trade secrets

constitutes a taking). Where such a *per se* taking has occurred, the taking authority generally must pay compensation regardless of the magnitude of the harm.

The Fifth Circuit appears to have read *Webb's* as recognizing a distinct property right in the interest earned on funds deposited with a court and forbidding a state from taking that entire property interest. *See* 93 F.3d at 1002. In this respect, the Fifth Circuit misread *Webb's*.

The *Webb's* Court did not view the interest on the deposited funds as a property interest separate from the funds themselves, but rather as an incident of the ownership of the principal, "the fruit of the fund's use," as the Court put it. 449 U.S. at 162. The right to interest is thus merely one of the "sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Although it is at times difficult to draw the line between a "confiscatory" taking of an entire property interest and a diminishing of the value of property by removing a "stick" from the "bundle," *see Lucas*, 505 U.S. at 1016 n.7, this Court in *Webb's* recognized that generally "interest . . . follows . . . principal," 449 U.S. at 162.[3]

[3] Application of the "ad hoc" analysis based on the three factors identified in *Penn Central* to the facts of *Webb's* clearly establishes that the retention of interest (in addition to a fee for services) in interpleader cases would constitute an impermissible regulatory taking. The "economic impact of the regulation on the claimant" was obviously substantial. The state kept more than $100,000 above and beyond its fee for administrative services. The retention of interest also had a significant effect on "distinct investment-backed expectations." The seller had such an expectation in getting paid for the assets it sold, and its creditors had a similar interest in getting paid for the goods and services they had sold to the seller. But for the commencement of the interpleader action and the consequent delay in the distribution of the asset sale proceeds, they presumably would have received payment promptly following the sale of *Webb's* assets and would have been able to put the payment to productive use. As to the "character of the government's action," this Court stressed in *Webb's* that "[n]o police power justification is offered for the deprivation" of the interest. *Id.* at 163. *See Sperry Corp.*, 493 U.S. at 62 n.8. Under the Court's current regulatory taking standards, it is quite certain that the result in *Webb's* would be the same.

The focus of this Court in *Webb's* was not simply on the interest earned on the deposit, but rather on the temporary loss of the *entire* beneficial use of the property — principal *and* interest. The Court observed that "[t]he county's appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property in *United States* v. *Causby*." 449 U.S. at 163-64. In *Causby*, flights in and out of an airport leased by the federal government during the Second World War flew so low over the plaintiffs' chicken farm that they became unable to use the property. The destruction of what the Court called the "owner's right to possess and exploit the land — that is to say, his beneficial ownership of it," 328 U.S. at 262, entitled the owner to compensation for a taking.

The Court in *Causby* noted that the owners would be entitled to compensation whether the servitude imposed by the passage of low-flying government aircraft over their farm was permanent or temporary, although the anticipated duration of the servitude would affect the amount of compensation. *Id.* at 267-68. In other cases, this Court has repeated that temporary takings of property are entitled to compensation for the lost beneficial use of their property during the period of the loss. *See, e.g., First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

The point of the analogy between *Causby* and *Webb's* is that in both cases the property owners lost *all* beneficial use of their property, at least temporarily. In *Causby*, farmers lost their ability to use their farm as a farm at all, at least during the government's heavy use of the airfield during wartime 328 U.S. at 259. In *Webb's*, the seller and creditors lost not only the interest on their funds, but also their ability to use their money at all during the period in which the fund was depos-

ited with the county court. It was the *total* loss of beneficial use that gave rise to the compensable taking.

If, as the foregoing analysis suggests, the focus in *Webb's* was the temporary *total* loss of beneficial use of the funds for a period of time, then *Webb's* has far less application to the Texas IOLTA program than the Fifth Circuit believed. There is no sense in which the IOLTA program deprives unwilling clients of the entire beneficial use of their funds as a comparison of the situation in *Webb's* and that of Texas clients makes clear:

> (i) The property owners in *Webb's* had no choice as to the loss of any access to or use of their property. By creating the interpleader remedy, the state permitted a third party to invoke the power of the state to deprive the property owners of such access and use without their consent pending the resolution of particular disputes. Clients in Texas need not authorize their lawyers to hold their funds at all.[4]
>
> (ii) The property owners in *Webb's* had no access to their funds during the pendency of the interpleader action. Client funds in lawyer trust accounts, including IOLTA accounts, must be available to clients on demand.

[4] *See Yee*, 503 U.S. at 527-28 (owner of mobile home park subjected to rent control statute had power to terminate leases and use property for other purposes; no taking found despite diminution of economic value); *Ruckelshaus*, 467 U.S. at 1005-08 (no taking of trade secrets where secrets disclosed to government agency as part of license application under regulatory scheme explicitly contemplating disclosure under specified circumstances; since property owner knew in advance the information might be disclosed, could avoid the disclosure by not seeking a license, and received compensating government benefits the owner waived any objection to the taking); *Nollan*, 483 U.S. at 833 n.2 (explaining *Ruckelshaus*).

> (iii) The property owners in *Webb's* had a reasonable, investment-backed expectation of being able to use and obtain a return on their portion of the sales proceeds from the time the buyer paid funds into court, an expectation that the commencement of the interpleader action thwarted. The only funds that can be deposited in Texas IOLTA accounts are funds as to which clients have no expectation of obtaining any kind of economic return. In other words, the beneficial use of funds deposited in Texas IOLTA accounts does not include any expectation of interest or other investment return while the lawyer holds the funds.

In short, while the property owners in *Webb's* were deprived of all beneficial use of their funds during the pendency of the interpleader action, clients who choose to entrust funds to their lawyers lose no beneficial use of their funds as a result of the Texas IOLTA program that they would not have lost in the absence of that program. If any "stick" in the property "bundle" was taken, it was no more than a "twig." As a result, that program does not involve a *per se* taking.

2. The Texas IOLTA program does not effectuate a regulatory taking because it has no adverse economic impact on the pertinent property owners.

As noted above, whether regulatory activity causes a taking depends on a particularized factual inquiry into the character of the governmental action, the economic impact of the regulation on the affected property owner, and the extent to which the regulation has interfered with the owner's distinct invest-

ment-backed expectations. Consideration of these factors in the context of the Texas IOLTA program compels the conclusion that even if there is some metaphysical "property" interest on the part of clients in the interest generated by funds deposited in IOLTA accounts, the IOLTA program does not bring about a taking requiring compensation under the Fifth Amendment.

i. *The character of the government action.* The character of the Texas IOLTA program is not in dispute. It is a program the sole purpose of which is to provide funding for non-profit organizations that deliver legal services to persons unable to afford those services or advance the administration of justice. This is unquestionably a legitimate and proper government goal. It presents a stark contrast with *Webb's* where the State advanced " [n]o police power justification" for withholding the interest on funds in interpleader action. 449 U.S. at 163.

ii. *The economic impact of the IOLTA program on clients.* The economic impact of the IOLTA program on clients is nonexistent by design. Client funds that are large enough or held long enough to generate any positive economic return to the clients are ineligible for IOLTA. Recognizing this, respondents have argued that they have lost the right to exclude others from any beneficial use of their deposits. While this Court has recognized (in very different contexts) the deprivation of a right of exclusion as having potential significance in a takings analysis,[5] where that right does not in fact have an economic significance, its loss through regulation will not give rise to a taking.

For example, in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), State law compelled a private shopping center owner to permit members of the public to distribute pamphlets

[5] *See, e.g., Nollan*, 483 U.S. at 831; *Loretto*, 458 U.S. at 433; *Kaiser Aetna*, 444 U.S. at 176.

and solicit petition signatures in the center, thus depriving the owner of the right of a private property owner to exclude. Yet the Court rejected the owner's taking claim, finding that "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." *Id.* at 83. The same analysis applies here as well.

iii. *The effect on reasonable investment-backed expectations.* The IOLTA program has no impact whatever on reasonable investment-backed expectations. Clients who entrust to their lawyers either very small sums of money or funds that will be held for very brief periods of time, have never had any expectation of receiving any investment return. The decision to entrust is not an investment decision, but rather a decision born of convenience and the need for security. It is simply easier in many instances to permit the lawyer to hold the funds than to set up separate trust or escrow arrangements. While the funds deposited in client funds accounts have always generated a return for the depository bank, the clients have never had any say in the bank's disposition of those funds.

The Texas IOLTA program deprives no client of anything the client expected to receive before the program was established.

* * * *

Analyzed under the principles applicable to regulatory takings, the IOLTA program manifestly does not constitute a taking. As this Court stated in *Webb's*, "governmental action that may deny the property owner of some beneficial use of his property" is generally upheld "if such public action is justified as promoting the general welfare." 449 U.S. at 163. That is the case here.

Conclusion

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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